

# **Effective Cross Examination**

*Trial Lawyers*

**Why We Love Being Litigators**

**By**

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## **CONTROLLING THE WITNESS ON CROSS EXAMINATION**

Controlling the witness on cross examination is key to an effective cross examination. You cannot control a witness on cross examination unless you have complete command of the facts of your case; you have analyzed all of the facts of your case, and then proceed to execute a well thought out plan.

Admittedly, not all cross examinations turn out as planned.

### **Controlling Through Leading Questions**

Leading questions are the best way to instill control in a witness. Leading questions not only suggest an answer but state the answer in no uncertain terms. For example:

- Q: You were the police officer?  
A: Yes.  
Q: You were the police officer on July 5, 2002?  
A: Yes.  
Q: You were the man writing the report on July 5, 2002?  
A: Yes.

As opposed to:

- Q: What, if anything, were you doing on July 5, 2002?

Leading questions should be short, declarative statements, generally with only one new fact per question.

### **Primacy and Recency**

It is an accepted rule in trial advocacy that fact finders remember best what they hear first and what they hear last, hence, the rule of primacy and recency.

It is why we fight so hard to have the first word and the last word in all arguments.

Applying the rules of primacy and recency, one should, whenever possible, use very short questions without taglines or phrases. Taglines and phrases generally serve to water down the emphasis and meaning of an otherwise extremely important question (a fact that shall be established).

That is not to say that sometimes there is a need to “prompt” or “encourage” a witness to answer an otherwise very fair question. In this situation, a tagline may need to be used. However, taglines should only be used sparingly and only if absolutely needed.

### **General to Specific**

The cross examiner should always begin a line of questioning from a very general point of view before focusing more specifically to a final fact or point the cross examiner intends to establish. For example:

Q: You drive trucks?  
A: Yes.  
Q: Eighteen wheelers?  
A: Yes.  
Q: For Roadway Express, Inc.?  
A: Yes.  
Q: As an employee?  
A: Yes.  
Q: It is your only job?  
A: Yes.  
Q: It is your only source of income?  
A: Yes.  
Q: Etc.

By this example, it can be seen how control is established with only leading questions, without taglines and phrases, starting very generally and moving with only one new fact per question to an end result which in this particular line of questioning is to establish that the defendant driver works for the defendant corporation. This line of questioning will also assist the cross examiner in establishing actions made by the defendant driver in the furtherance of his employment with the defendant corporation.

By way of another example in a criminal case:

Q: You found drugs?  
A: Yes.  
Q: You found illegal drugs”?  
A: Yes.  
Q: You found them in the car?  
A: Yes.  
Q: In the trunk?  
A: Yes.  
Q: In a duffle bag?  
A: Yes.  
Q: Inside a plastic bag?  
A: Yes.

Q: That was inside a paper bag?  
A: Yes.  
Q: All of which was inside another trash bag?  
A: Yes.

(Next chapter)

Q: The last bag the drugs were in was a plastic bag?  
A: Yes.  
Q: A zip lock bag?  
A: Yes.  
Q: A smooth plastic surface?  
A: Yes.  
Q: One that appeared clean?  
A: Yes.  
Q: One that did not have any visible dirt?  
A: Yes.  
Q: No visible oil?  
A: Yes.  
Q: No visible contaminants whatsoever?  
A: Yes.  
Q: You handled the bag?  
A: Yes.  
Q: With your hands?  
A: Yes.  
Q: Without wearing gloves?  
A: Yes.  
Q: With your bare hands?  
A: Yes.  
Q: You did not have the bag tested for fingerprints?  
A: No.  
Q: You never dusted it?  
A: No.  
Q: You never asked a fingerprint expert to analyze it?  
A: No.  
Q: All you did was stick it in a box and lock it in the evidence room?  
A: Yes.

This example from a criminal case shows in two separate areas for one witness how a general beginning moving toward a specific goal not only controls the witness but tells the story of the drugs that were so well hidden, no one including your client could have seen them or known that they were there and exposing the fact that the officer contaminated and ruined the only good way of “excluding your client.”

## **Other Possible Lines of Cross Examination of Agents**

- Q: You are an agent?  
A: Yes.  
Q: With the Federal Bureau of Investigation?  
A: Yes.  
Q: They don't just call you Agent, they call you Special Agent?  
A: Yes.  
Q: Because you are a professional?  
A: Yes.  
Q: You have been trained to be a professional?  
A: Yes.  
Q: You work hard?  
A: Yes.  
Q: You work hard at being a professional?  
A: Yes.  
Q: As a professional, you have learned how to write reports?  
A: Yes.  
Q: As a professional, you have learned and been trained that reports are important?  
A: Yes.  
Q: They must be detailed?  
A: Yes.  
Q: They must be accurate?  
A: Yes.  
Q: They must be truthful?  
A: Yes.  
Q: In this case, you did a report?  
A: Yes.  
Q: Reports are important?  
A: Yes.  
Q: Important because people have to rely on them?  
A: Yes.  
Q: Rely on them without ever talking to you sometimes?  
A: Yes.  
Q: That includes prosecutors?  
A: Yes.  
Q: Judges?  
A: Yes.  
Q: And even defense lawyers?  
A: Yes.  
Q: That is why they must be accurate?  
A: Yes.  
Q: And detailed.  
A: Yes.

Etc.

It is important to organize cross examination and carefully sequence the order in which you ask your questions, and the order in which you ask about areas (chapters) in your cross examination. For this reason, it is recommended that the cross examiner place one idea per page or one chapter per page of notes so that they can be shuffled and organized and reorganized as your theory of defense changes or is modified. Further, you can take a chapter out of your cross examination easily if it is one you decide not to delve into during the trial.

Most importantly, it helps doing what we all fear as cross examiners “asking one question too many” which you only realize has happened after it has happened, unless this method is employed.

### **Possible Cross Examination of Truck Drivers in Civil Cases**

#### **Visual Search:**

A visual search must be conducted at all times while operating an eighteen wheel vehicle. A visual search, in short, is a search requiring a truck driver to basically be aware of what is going on around him. These issues of being aware of what is around him are affected by many factors that include, but are not limited to, the following:

1. Blind spots such as the length of his hood, the width of his vehicle, the height of his vehicle, the length of his vehicle, etc.
2. Distractions such as billboards, pedestrians, parked vehicles, parking vehicles (tail lights and reverse lights), radios, cell phones, etc.

### **Equipment Violations or Issues**

It is generally a good practice to insure that there is no surprise defense at trial regarding defective equipment. Always cross examine at deposition regarding the worthiness of the vehicle the defendant driver was operating.

Q: You inspected the vehicle before your trip?

A: Yes.

Q: It is a detailed inspection?

A: Yes.

Q: It is a thorough inspection?

A: Yes.

Q: You are careful when inspecting it?

A: Yes.

Q: You pay close attention when inspecting it?

A: Yes.

Etc. (brakes, steering, shocks, tires, windshield, lug nuts, etc.)

## **Log Books, Time Lines, and Speed**

It is important to always establish the requirement for log books, their need for accuracy, and their requirement to be filled out as and when events occur. Log books are especially important because drivers' memories can fade as all people's memories fade over time. Look for inconsistencies and, of course, pay close attention at deposition and trial if testimony is elicited from the driver that can be, or would arguably be, inconsistent with his/her log book.

## **Interaction with a Police Officer**

Truck drivers know the importance of paperwork and know the importance of being honest, accurate, and detailed with police officers when they are stopped (or they will usually admit to this). It is important to insure that the driver knows the police officer was investigating the wreck, was asking questions, the driver was answering questions, and most importantly the driver noticed that the police officer was writing notes as he was talking to the driver.

This can offer assistance to the typical defense of, "I told the police officer there were no brake lights, he must not have written it in the report."

Sample line of questioning:

- Q: You were approached by the police officer?  
A: Yes.  
Q: He asked you what had happened?  
A: Yes.  
Q: You told him?  
A: Yes.  
Q: He asked you questions?  
A: Yes.  
Q: That you answered?  
A: Yes.  
Q: You cooperated?  
A: Yes.  
Q: You wanted to tell him everything?  
A: Yes.  
Q: You wanted to be detailed?  
A: Yes.  
Q: You wanted to be accurate?  
A: Yes.  
Q: You wanted to be careful that he knew as much as you knew?  
A: Yes.  
Q: You saw him with a pad?

A: Yes.  
Q: You saw him with a pen?  
A: Yes.  
Q: You saw him writing with the pen?  
A: Yes.  
Q: In your eye sight?  
A: Yes.  
Q: In your ear shot?  
A: Yes.  
Q: While he was talking to you?  
A: Yes.  
Q: While he was asking you questions?  
A: Yes.  
Q: And as you were answering his questions?  
A: Yes.

In conclusion, these are only a few of the areas a cross examiner should focus upon when cross examining eighteen wheel truck drivers. This is in no way an exhaustive list of areas a cross examiner should focus upon, but they are starting points and building blocks regarding liability of a defendant driver. Further, it should never be underestimated the value of cross examination that in part focuses upon damages. In other words, what did the defendant driver see, can you establish what the defendant driver saw, or observed otherwise, of your client? For example: the severity of the wreck, blood, complaints, the ambulance, his or her own injuries.